IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 24/06/2003

CORAM

THE HONOURABLE MR.JUSTICE V.KANAGARAJ

SECOND APPEAL NO.812 OF 1999
AND
C.M.P.No.8242 OF 1999.

Sevathal @ Lakshmi Ammal ... Appellant

-Vs-

Balan ... Respondent

Second Appeal filed under Section 100 CPC for the relief as stated therein.

!For appellant : Mr.C.R.Muralidharan

^For respondent : Mr.T.Kandasamy

:JUDGMENT
This Second Appeal is directed against the judgment and decree dated 20.2.1998 rendered in A.S.No.108 of 1996 by the Court of III Additional District Judge, Dharmapuri at Krishnagiri thereby reversing the judgment and decree dated 30.8.1996 rendered in O.S.No.227 of 1991 by the Court of District Munsif, Krishnagiri.

2. The plaintiff is the appellant and he has filed the suit against the respondent herein for declaration that he has got a right in the pathway indicated as 'AB' in the plaint rough plan and that he has got the right to pass through the said pathway to the well and to take his cart and cattle and for a permanent injunction restraining the defendant from in any manner interfering with the plaintiff's usage of the said pathway and for costs on averments such as that the suit property was originally belonged to one Atmarao and his brother Satyanarayana Rao; that there are two wells and to reach the well and to take the cattle, the channel measuring 4 ft. breadth in S.Nos.597 and 59 8/4 of Kallakurichi village has to be crossed; that the said brothers have sold away 1/4th share in favour of the plaintiff in the well and from the date of purchase, the plaintiff is in possession and enjoyment of the said pathway; that the vendors have been making use of the pathway for over 50 years; that for the suit property, the patta and chitta stand only in the name of the plaintiff and that he is paying the kist; that the defendant has purchased lands on all the three directions except on the North of the plaintiff's property and since the defendant has also got a share in the suit

property, taking advantage of the same, he is obstructing the plaintiff from making use of the pathway and hence the suit for declaration and permanent injunction.

3. In the written statement filed by the respondent/defendant, he would submit that he does not deny the right of the plaintiff to 1/4 th share in the two wells and that the plaintiff is enjoying the property that she purchased, but she never made use of the channel as the pathway and the defendant would also deny the allegation that the vendors of the plaintiff were making use of the channel as the pathway; that the plaint rough plan is a false one; that to reach the well, the vendors of the plaintiff only made use of the 'kodivaikal' and the plaintiff has got only the right of pathway and therefore the plaintiff is not entitled to get the relief sought for; that there is no cause of action for the suit; that he cannot make out the suit and hence would pray to dismiss the suit with costs.

4. The trial Court, based on these pleadings, would frame three issues, viz.:
1.Whether the plaintiff is entitled to the suit property?
2.Whether the plaintiff is entitled to get the reliefs of declaration and permanent injunction?
3.What relief, if any, the plaintiff is entitled to?
Thereafter, the trial Court would conduct a trial in which the plaintiff, on his part, would not only examine herself as P.W.1 but also examine another Govindasamy as P.W.2 for oral evidence. For documentary evidence, the plaintiff would mark three documents as Exs.A.1 to A.3, Ex.A.1 dated 5.5.1996 is a sale deed executed by Atmarao and Satyanarayana Rao in favour of the plaintiff, Ex.A.2 is the patta No.385 and Ex.A.3 dated 15.2.1991 is the kist receipt in the name of plaintiff for fasli 1400.

5. On the part of the defendant, he would examine himself as the sole witness on his side as D.W.1 for oral evidence and would mark no documents for documentary evidence in support of his case. Besides these evidence placed by parties, two documents would be marked as Court documents as Exs.C.1 and C.2, Ex.C.1 being the report of the Commissioner and Ex.C.2 being the rough sketch of the Commissioner.

6. The defendant as D.W.1 would admit in his evidence that there had been no panchayat and that the plaintiff and himself have rights in the suit property; that himself and the plaintiff are making use of the suit property at present and there is no dispute regarding the same. Further, in the cross-examination, D.W.1 has stated that he does not know which pathway their vendors made use of to reach the well; that the plaintiff and himself are not in talking terms, but there is no dispute among themselves and peaceful atmosphere prevails among their family members also; that one well is in his land and the other in the land of the plaintiff and that the plaintiff is entitled to 1/4th share and the defendant is entitled to 3/4 shares in both the wells. Relying on such evidence of D.W.1 and further seeing that both the parties have to go to both the wells in which they have got the right, the trial Court would arrive at the conclusion to hold that both the parties are entitled to make use of the suit property as the pathway to take men and

cattle through the same and therefore would decide Issue Nos.1 and 2 in favour of the plaintiff and regarding Issue No.3, the trial Court would hold that the the plaintiff is entitled for declaration and permanent injunction as prayed for and would pass the decree in favour of the plaintiff but without costs.

7. Aggrieved, the defendant in the suit would prefer an appeal before the Court of III Additional District Judge, Dharmapuri at Krishnagiri and the said Court, would frame four points for determination of the appeal viz.

1.Whether the plaintiff is entitled to the relief of declaration to pass through the 'AB' channel as a regular pathway?
2.Whether the plaintiff is entitled to the relief of permanent injunction?
3.Whether the bunds of the 'AB' channel have been shown in the plaint rough sketch? and
4.Whether it is necessary to set aside the judgment and decree passed by the trial Court?

Thereafter, the first appellate Court having its own discussions would opine that even in the event that the plaintiff is making use of the bunds of the channel to take men and cattle to the well, it cannot be decided as a regular pathway and if at all it had been made use of, it is only an easementary right and that the bunds which the plaintiff has been making use of has not been shown in the plaint rough plan and therefore the plaintiff is not entitled to the relief of declaration. The first appellate Court would further opine that if there is no pathway available, the easement of necessity would arise in favour of the plaintiff but since in the pleadings of the defendant, it has been pleaded that there is an alternate pathway and if at all there is no alternate pathway, the plaintiff should have prayed for the relief of easement of necessity instead of seeking for the relief of declaration and injunction and therefore the lower appellate Court would hold that since the plaintiff has not prayed for the correct relief, she is not entitled to either declaration or injunction. Further more, the lower appellate Court would also remark that along with channel, the bunds are not shown in the plaint rough plan and because of this defect, the plaintiff is not entitled to the relief of permanent injunction and on such observations, the first appellate Court would ultimately reverse the findings of the trial Court by setting aside the judgment and decree of the trial Court thus allowing the appeal preferred by the defendant. It is against this judgment and decree passed by the first appellate Court dated 20.2.1998, the plaintiff in the suit has come forward to prefer the above Second Appeal on certain grounds as brought forth in the grounds of appeal and raising the following questions as substantial questions of law:

1.Whether the lower appellate Court is right in holding that the plaintiff had failed to plead easementary rights over the suit 'mamool' pathway and in thereby non-suing the plaintiff, without considering that the right to user of the suit pathway is by itself an easementary right which the plaintiff had prescribed by her continuous and uninterrupted enjoyment for over the statutory period?

2.Whether the lower appellate Court is right in reversing the judgment and decree of the trial Court on the ground of mis-description of the suit 'mamool' pathway in the schedule and plan appended to the plaint, particularly when the existence and common enjoyment of the same is no disputed by the defendant?

3.Whether the judgment and decree of the lower appellate Court are vitiated on account of its failure to appreciate the pleadings and evidence in the proper perspective, particularly when the actual existence and common enjoyment of the disputed pathway is categorically admitted by the defendant?

8. During arguments, the learned counsel appearing on behalf of the appellant, besides bringing forth the facts as pleaded in the plaint and the written statement, would lay emphasis that the plaintiff is entitled to 1/4th share in both wells to reach which, she has to necessarily make use of the channel and the bunds as the pathway and it is only the right that she derived from the original owner as it is the case of the defendant, the plaintiff wants to ascertain and that there is no necessity on the part of the plaintiff to seek for the alternate relief of easement of necessity nor is it true that the plaintiff has not brought into the plaint rough plan the bunds which is immaterial. The learned counsel would also cite two judgments in favour of his case, the first one delivered in AYYASWAMI GOUNDER AND OTHERS vs. V.MUNNUSWAMY GOUNDER AND OTHERS reported in AIR 1984 SC 1789 wherein it has been held:

"In the absence of any specific pleading regarding prejudice or detriment to the defendants-respondents the plaintiffs had every right to use the common land and the common channel. The plaintiffsappellants were claiming their right on the basis of admitted co-ownership rights which includes unrestricted user, unlimited in point of disposition, and it could not be said that the plaintiffs' right to take water was not acquired by any grant from the defendants-respondents or from any other sale deed. The right of co-ownership presupposes a bundle of rights. The only restriction put by law on the common user of land by a co-owner is that it should not be so used as to prejudicially affect or put the other co-owner to a detriment. Further, the plaintiffs claimed easementary right only as an alternative ground but the main ground on which they based their claim was on the right of co-ownership, therefore Illustration (c) to S.8 (of the Easements Act) would not be applicable as it applies where a co-owner seeks to impose an easementary right on the land or any part thereof."

9. The second judgment cited by the learned counsel for the appellant is one delivered by a learned single Judge of this Court in MURUGESA MOOPANAR vs. SIVAGNANA MUDALIAR reported in 1997(I) CTC 348 wherein it has been held:

"Section 13 of the Indian Easements Act deals with easement of necessity. An easement of necessity can arise only when there is a cessation of common ownership. It arises where both the servant and dominant tenement were in common ownership and by disposition, there was disintegration of the

tenements. It is also well settled that easement of necessity arises only where by a transfer, bequest or partition, a single tenement is divided into two or more tenements and any of those is to be situated that it cannot be enjoyed at all without certain privilege on another such tenement. When there is an impossibility of enjoyment an implied grant or reservation will be presumed in favour of the person holding the former tenement. It is also settled law that the creation of easement of necessity is an outcome of the prior relationship between the tenements. The disposition which terminates the common ownership and gives rise to an easement by implication of law, may be of either tenement, or may be a simultaneous disposition of both tenements. "Easement" is also defined as a right which the owner or occupier of certain land possesses, an such, for the beneficial enjoyment of that land, to do and continue to do something, or to prevent and continue to do thing being done, in or upon, or in respect of certain other land not his own. It is a curtailment on the enjoyment of the absolute owner and, therefore, unless it is priced by the appellants that they are entitled to curtail the rights of the plaintiff in the enjoyment of his land, they cannot claim a right of easement."

On such arguments, the learned counsel for the appellant would pray to allow the above second appeal setting aside the judgment and decree passed by the first appellate Court further restoring the judgment and decree passed by the trial Court.

10. In reply, the learned counsel appearing on behalf of the respondent would argue that the easement of prescription or necessity have not been pleaded by the plaintiff and that now the plaintiff is attempting to impress the Court on those things; that she has not even made use of the term 'easement'; that the appellant purchased only 1/4 th right in the well and bailing of water from the well and now she is attempting to set up a prescriptive right to convert the well into a channel; that no issue had been framed to that effect regarding the relief sought for nor about the regular pathway and citing the extracts from the judgment of the first appellate Court, the learned counsel would ultimately submit that there is no merit in the appeal and would pray to dismiss the same.

11. In consideration of the facts pleaded, having regard to the materials placed on record and upon hearing the learned counsel for both, what comes to be known is that the plaintiff has come forward to file the suit for declaration and injunction pertaining to the suit property which comprised of two wells and a channel leading to the wells pertaining to which the case of the plaintiff is that since she got 1/4th share in the well as it is the case of the defendant who has got 3/4 shares in both wells, as it has been case of the predecessorin-title to both the plaintiff and the defendant in making use of the bunds of the channel for over 50 years, following the same, the plaintiff is making use of the bunds of the channel as pathway and since the defendant has started obstructing her from enjoying her usual and regular pathway to reach the wells in order to enjoy her share of water from the same by taking men and cattle, she has come forward to file the suit seeking the relief extracted supra.

12. On the part of the defendant, though the rights of parties in the well i.e. 1/4 share to the plaintiff and 3/4 shares to the defendant and making use of the bunds of the channel by their predecessors-in-title and after the purchase, the plaintiff is making use of the channel have not been denied, the defendant would come forward to say that the plaintiff has no such right to be exercised. It should be noted that the plaintiff has come forward only to ascertain the rights enjoyed by her and not to create a novel right in her favour, whether it is the right of easement of necessity or any other right as it has been brought anew by the first

appellate Court. The first appellate Court would itself presume the existence of an alternate pathway merely on the pleadings of the defendant without any proof of the same nor the same being established in evidence.

13. On the part of the plaintiff, clinching documents have been filed including the sale deed, the patta, chitta and for the kist having been paid to the Government. But, on the part of the defendant, the documentary evidence submitted is nil. Moreover, in establishing the facts of the case, as put forth on the part of the plaintiff, she would not only examine herself as P.W.1 but also would examine yet another witness as P.W.2 and therefore to the existing conditions, it should be admitted that the plaintiff has proved her case to the requirements of law i.e. with preponderance of probability. It should be understood that the right that had already been in existence is only sought to be ascertained and no novel right is sought to be created in favour of the plaintiff by filing the suit for declaration and permanent injunction and therefore no other novelty could be introduced much less in the name of the easementary right whether it is easement of prescription or otherwise since the plaintiff has put her case in plain terms and in order to ascertain her rights and to obstruct the respondent from interfering with her usual right of pathway only she has come forward to file the suit as prayed for explaining the things in a simple and lucid manner.

14. It is relevant and noteworthy to see that neither the plea of the right of issue of prescription nor that of the necessity has been pleaded in the written statement by the defendant but it has been simply stated that the plaintiff is having some alternate pathway without establishing the same in evidence. While such is the position, the first appellate Court has gone a step forward and without even the pleading to the said effect, it has concluded that the plaintiff should have pleaded either the easement of prescription or necessity, which is a wasteful exercise assumed on the part of the first appellate Court.

15. Further, the comments made on the part of the first appellate Court to the effect that the bunds of the channel have not been shown in the plaint rough plan is yet another example for the first appellate Court having gone into unnecessary and irrelevant aspects since it is the common knowledge that without the bunds, there cannot be a channel and such minute points need not be stressed at all.

16. For all these discussions held on facts and in

consideration of the position of law on the subject, it is only desirable on the part of the first appellate Court to have confirmed the judgment and decree as passed by the trial Court since the case put up by the plaintiff has been proved to the extent of the requirement of law i.e. with preponderance of probability and therefore the judgment and decree passed by the first appellate Court becomes necessarily to be set aside.

In result,
(i)the above second appeal succeeds and the same is allowed.

(ii)The judgment and decree dated 20.2.1998 rendered in A.S.No.108 of 1996 by the Court of III Additional District Judge, Dharmapuri at Krishnagiri is hereby set aside and the judgment and decree dated 30.8.1996 rendered in O.S.No.227 of 1991 by the Court of District Munsif, Krishnagiri is hereby restored.

However, in the circumstances of the case, there shall be no order as to costs.

Consequently, C.M.P.No.8242 of 1999 is closed.

Index: Yes
Internet: Yes
Rao

To

1.The III Additional District Judge,
Dharmapuri at Krishnagiri.

2.The District Munsif,
Krishnagiri.

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